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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 23

THE UNITED STATES OF AMERICA, AS GUARDIAN OF THE INDIANS OF THE TRIBE OF HUALPAI IN THE STATE OF ARIZONA,

Petitioner,

vs.

SANTA FE PACIFIC RAILROAD COMPANY, A CORPORATION,

Respondent.

RESPONDENT'S BRIEF—PART 2. AN ANALYSIS OF THE LAWS OF SPAIN AND MEXICO.

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RESPONDENT'S BRIEF, Part 2.

AN ANALYSIS OF THE LAWS OF SPAIN AND MEXICO.

Petitioner first contends that the status of the Indians—specifically the Walapai Indians—on whose behalf it appears, may be determined without reference to the status of this tribe under the laws of Spain or Mexico. Respondent, as its brief amply shows, has no objection whatever to arguing this case exclusively as a matter of law under the statutes of the United States.

It is clear, however, that the Treaty of Guadalupe Hidalgo did reflect the intention of the United States

* Herein spelled "Walapai".

Government to accord rights to the inhabitants of the ceded territory such as they had enjoyed under Spanish and Mexican law.

Obviously, it is important to determine what those rights were, as bearing on the intent of Congress in various acts which were enacted by it and as shedding light on the administration of those acts by the Executive department of our Government. Respondent's contention is that the Walapai Indians had no possessory or demesne rights in the lands on which they were found at the date of the treaty, and that accordingly if they were to acquire any such rights they would have to be derived in some fashion from the United States. The United States made inquiry to ascertain what, if any, rights the Indians such as the Walapai had at the date of the treaty, and thereafter proceeded on the assumption that no rights existed. The foregoing has been demonstrated in Respondent's brief; and it welcomes the opportunity of discussing what in fact were the rights of Indians such as the Walapai under the laws of Spain and Mexico. We are gratified that, despite Petitioner's contention of its irrelevance, they discuss the pre-treaty status of the Walapai, and that whatever arguments can be advanced against Respondent's position are fully and ably presented.

Petitioner's arguments on this matter are contained in pp. 61-79 of its brief. They may be said to consist of the following material:

1. Copious quotations from the work of Franciscus de Victoria (or Vitoria, in Spanish) recently more fully recognized than he had been before as one of the founders of modern International Law. These are found on pp. 61-67.

2. Reference to paragraphs in the *Recopilacion de Leyes de Las Indias*, pp. 67-68.

3. Reference to special dealings with certain Indians by the Spanish Crown, p. 71.

4. A brief statement as to the continuity of Mexican and Spanish law, p. 76.

It would be sufficient to say in relation to these arguments of Petitioner that no one of them directly relates to the only point involved, and that is the question of whether the fact of occupancy of a large tract of land, by a tribe regarded as savage, constituted at Spanish and Mexican law anything remotely approaching a title or constituted any sort of ownership or invested the tribe as such with any rights as to the land over which its members roamed.

Petitioner's arguments do not deal at all with the many citations of specific authority contained in previous briefs of Respondent of which the most important are the passages from Wistana Orozco's book on Domain lands (Tierras baldios), *Legislacion y Jurisprudencia sobre Tierras Baldios*, 2, p. 765, referring to the roval cedula of November 10, 1591.

> "The royal cedula cited established the legal principle that all the conquered lands belonged in full dominion to the royal crown of Spain,—an arbitrary disposal which deprived, with the solemnity of a royal decree, the ancient inhabitants of the country of the legitimate property rights and titles they enjoyed over the soil."

We may add further the passage of the same book, pp. 87-95, which established that all the lands not specifically granted to persons capable of holding them were in the Crown and, after Mexican independence, in the Republic of Mexico.

While, therefore, Petitioner's citations in this matter are irrelevant, since they do not deal with the real issue, Respondent is fully ready to answer the contentions for whatever value they have:

The citations from the works of de Victoria demonstrate that in the opinion of this lofty-minded and humane theologian, infidels and savages were human beings and had all the human and personal rights of all human beings. This was at the time a matter of utmost theoretical interest

since it was actually contended by some writers of the early sixteenth century that the Indians of the New World were not, properly speaking, human beings or capable of entering the Christian communion. Others who did not go so far declared, with large citations of authority from the Bible and classical authors, that while capable of receiving Christian baptism, the Indians were designed for perpetual slavery.

De Victoria took a strong stand against both these contentions and thereby deserves the glowing eulogies that have been bestowed upon him by modern writers. His point of view is much more humane than that of Edward Coke, as set forth in *Calvin's Case*, 7 Coke 17b, 77 E. R. 398. It should, however, be added that Coke's brutal doctrine was not accepted by later common lawyers and that it was formally declared to be a principle of the common law, as de Victoria declared it of the law of nature, that Indians were not as such deprived of personal rights. Cf. 1 Blackstone's Commentaries No. 107; and 2 P. Wms. 75, 24 E. Rep. 674.

But the entire contention of de Victoria, based on the law of nature, merely goes to the question of the personal rights of the Indians as human beings. They are not to be enslaved, not to be killed, not to be injured in body or in personal relations. And whatever property they *lawfully* have may not be taken from them except—one is almost tempted to say—by due process of law. The issue, however, of the property rights of savages lay in just this: What property is *lawfully* theirs?

Petitioner's point would have relevancy only if it had been contended by Respondent that Indians under Spanish law were persons devoid of rights of any description, or that no Indian or group of Indians could ever acquire ownership in land or legally protected rights in land. It is only such a statement that would be contrary to the

position of de Victoria. (But Respondent at no time made any such statement, and makes no such statement now.)

On the contrary, it is a point of Respondent's case that individual Indians and organized pueblo-communities could and did own land in the only way in which ownership could be acquired in New Spain—which includes Mexico—and that was by grant of the King or by charter or cedula confirming rights claimed before.

Petitioner at no stage in this protracted litigation has been able to point to a single document in which the Walapai Indians had been confirmed in the ownership or owner-like control of the lands in controversy. Nor have counsel been able to point to a single public declaration of any Spanish authority recognizing in blanket form such property rights in Indian tribes in general.

Petitioner does indeed cite on p. 71 of its brief, a treaty made by the Crown of Spain in 1784 with the Tallapuche Indians, for which it cites as authority 2 *White's New Recopilacion*, pp. 318, 321. But it omits to mention several things that are of the utmost importance.

The Tallapuche Indians were in Florida and not in New Spain. They had never been conquered. They were an organized and settled tribe. The treaty in question first brought them under the jurisdiction of the Spanish Crown and on the terms there given. If a similar treaty could be found with the Walapai that would have some relevancy. But the Tallapuche treaty clearly cannot be relevant to the issue, except to confirm, what no one questions, that Indians under the Crown might own land, if they showed a title to it by grant or, as in this case, by formal recognition in a treaty.

The primary contention of Respondent (which even the passages cited by Petitioner admit by implication) is that all the soil of New Spain became the property of the Crown. This was based only to a very minor degree on the famous

papal bull of Alexander VI. The legal position was that it was based on conquest. No one questioned—not even humanitarian theologians like de Victoria—that conquest was an adequate basis of title.

The title of the Kings of Spain is fully examined in Chapter XII of the sixth book of Solorzano already quoted, in which the unqualified ownership of the crown in all land that has not been specifically transferred to persons natural or corporate is given complete expression.

I should like particularly to call attention to section 3 of this chapter which follows:

> "3. Y recogiéndome Yo á lo que toca á la de las Indias, hallo, que esta misma Regalia tienen nuestros gloriosos Reyes an ellas, en tal forma, que fuera de las tierras, prados, pastos, montes y aguas, que por particular gracia y merced suya se hallaren concedidas á las Ciudades, Villas ó Lugares de las mismas Indias, ó á otras Comunidades ó personas particulares de ellas, todo lo demás de este género y especialmente lo que estuviere por romper y cultivar, es y debe ser de su Real Corona y dominio."—De Solorzano, *Politica Indiana*, L. VI., Chap. XII, Sec. 3.

[Translation]

> 3. And turning to that which touches the affairs of the Indies, I find that many of our glorious Kings hold (these royal rights) in them, in this way that outside of the lands, fields, pastures, mountains and waters which only of his particular grace and charity are found granted to Cities, Towns, or Localities of the same Indies or to other Communities or particular persons of them, all the rest of this kind and especially that which can be ploughed and cultivated is and ought to belong to His Royal Crown and Dominion.

This right of the Spanish sovereign in the land was often expressed by the very terms of the grants. And that the disposition of lands in New Spain frequently involved the removal of Indians, their resettlement, their formal deprivation, is shown by the situations expressed and implied

in nearly all the grants of large territories by the Spanish Crown; and as has been said, there was nothing to prevent these grants from being made to Indians as well as Spaniards and to organized Indian pueblos.

The property therefore which is meant in the paragraphs from the *Recopilacion de Leyes de Las Indias*, on pp. 67-68 of the Petitioner's brief is land which "of right belongs" to Indians, in the sense that they can show a lawful title to it emanating from the Spanish Crown. Individual Indians and pueblos may not be dispossessed of land which they have lawfully obtained. The Indians mentioned are Indians living in the midst of Spanish colonists, and they are to be protected from private greed and from the incompetence or corruption of royal officials. The *leyes* of the Recopilacion are specifically addressed, it will be noted to governors and administrators.

And it is further clear that no prescriptive title in the lands occupied by the Walapai Indians or by similar groups, could be urged against the Crown. To be effective, prescriptive rights in Spanish law were predicated on a *justus titulus*, that is on a lawful and formally correct form of acquisition. No such *justus titulus* could possibly be found for the ranging of a wandering tribe over territory neither defined by limits nor otherwise clearly identifiable.

What is said in Petitioner's brief on the Spanish law of prescription (p. 70, Note 67) is undoubted law. Indeed, it is an essential part of Respondent's case. If the Walapai had been, as is stated in that note, "a city, town or village or a similarly recognized community" and if the Laws of Toro (B. 10, Title 17, Law 1) were complied with, then the Walapai might have required "civil and criminal jurisdiction" as is provided in a paragraph of the *Novisimo Recopilacion*.

But that the Walapai were such an organized community

is not alleged even by Petitioner and is obviously not true; and that the Laws of Toro had been complied with is not even remotely suggested. Petitioner does not tell us what these Laws of Toro demand. We should like to supply the omission by noting that these laws, like all Spanish laws on the subject, require a "*justus titulus*", a formally correct form of acquisition (wholly lacking here) and good faith.

So far as the second paragraph of the above-cited note is concerned, this, as is stated, refers to the *mayorazgo*, which is translated as "inheritance". The word, however, does not mean inheritance but an institution like the fee-tail, the Roman *familiare fidei-commissum*. It need hardly be pointed out that the Walapai did not enjoy a "fee-tail" in their lands, a form meaningless except for individual families and created by an elaborate system of documents. Incidentally, all *mayorazgos* were abolished in Mexico as soon as independence was established.

But we are not reduced to merely negative arguments. In the *Recopilacion de Leyes de Las Indias*, (Lib. 4, Tit. 15, Ley 2) it is expressly provided that permissive user, even of determined and limited land, and *a fortiori* of vague territories, would establish no prescription. There can be no prescription, it is declared of lands held, *por toleracion ej sin titula valido*, i. e. "by sufferance and without a formally valid claim of ownership." The best that can be said about the Walapai Indians is that they were not ejected from the lands over which they roamed. Nothing could be less suited to satisfy the requirements of prescription, to which fact Petitioner's brief itself calls our attention.

It may further be noted as a curious fact that the case of Petitioner is made to rest on a prescriptive title against the state when the weight of its argument has always been that Respondent could not get a prescriptive title against the state, in spite of user, long occupancy, payment of taxes

and other special assessments and confirmation by Executive order and legislative enactment.

De Victoria was a saintly and learned man. He was not, however, a legal authority so far as Spanish courts and administrators were concerned. If the generalizations quoted on pp. 63-67 were to be heard as a basis of legal claims, they would refute themselves as wholly unrealistic. If his "conclusion", cited on p. 66 of Petitioner's brief with apparent approval, that "at the time of the Spaniards' first voyages to America, they took with them no right to occupy the lands of the indigenous population" really expressed the law of Spain, as Petitioner wishes to understand it, it could only follow that neither the Spanish Crown nor the Republic of Mexico ever had the ownership of these lands or had the power to cede them by treaty to the United States.

This *reductio ad absurdum*, however, merely suggests—and the entire book of de Victoria confirms this—that what he was speaking of is the right of the Indians *before* the conquest. Once the conquest was completed the "conclusion" cited is clearly without bearing on the rights of the Crown or of others to the lands of New Spain.

De Victoria contented himself with general and broad exposition of principles. A much more definitely legal authority for our purposes was the great jurist of the next generation, Diego Covarrubias, whose collected works were the constant books of reference of Spanish lawyers. Covarrubias, more realistically if less humanely, expressed the accepted doctrine that "pagans" had no real rights in property. In *Opera Omnia* (1679) I, 679.2 he says:

> "Unbelievers so long as they are unbelievers, possess their property only at the will of Christian sovereigns and therefore may be deprived of their property."

But all these generalizations are of less authority for our purpose than the presentation of the law of Spain in

this matter by Juan de Solorzano-Pereira, a member of the Royal Council whose book *De Indiarum Gubernatione*, published in the sixteenth century, remained a permanent manual of Spanish administration.

The Spanish translation was called *Politica Indiana*. The standard edition was published in 1647 but has been frequently reprinted, most recently in 1940. The Latin version will be referred to later.

Solorzano traces the title of the Spanish crown in part from the Bull of Alexander VI, which he discusses in detail in the first book of his work. His position on the rights of savages and infidels is stated in the passage that immediately follows:

> "9. Antonio Scapo es del mismo sentir: porque haviendo dicho primero, que la jurisdiccion, y dominio de las tierras, y de otras cosas por derecho Divino, y natural de las gentes igualmente compete á Infieles, y á Fieles; punto en que convienen otros muchos Autores. Luego siguiendo á Ostiense, Oldraldo, y otros que refiere, añade, qua despues de la venida de Christo todo esto se mudó, y traslado á la Iglesia de tal suerte que los Infieles oy, de qualquier condicion que sean, ni tienen, ni pueden tener jurisdiccion, dominio, honores, ni potestades: y que de todo esto pueden justa, y licitamente ser despojados sino reconocen el dominio de la Iglesia."—De Solorzano, *Politica Indiana*, L. I., Chap. X, Sec. 9.

[Translation]

> Antonio Scapo is of the same opinion (viz. that pagans are subject to the Church); because having first said that the jurisdiction and ownership of lands and other things belongs by divine law and by natural law of human beings equally to Unbelievers and Believers, a point on which many other authors agree. Then following Ostiense, Olarado and others whom he cites, he adds that since the coming of Christ all this changed and was transferred to the church in such a way that the Unbelievers of today of whatever condition they are, neither hold nor can hold Jurisdiction title, honors

nor powers and of all this they can be justly and lawfully deprived unless they recognize the title of the Church.

Solorzano repeats all the generalizations of the great theologians on the rights of Indians to person and property as human beings, and the background he has in mind is clearly that presented by Indians living as fellow-denizens of occupied lands with Spaniards or as slaves or servants of Spaniards. What his highly authoritative judgment was on the status of Indians like those of the Walapai, may be seen from two passages. We quote from the edition of 1777, Vol. 2, p. 10:

"Quamvis nulla possessio ab Hispanis praetexerent, solebant tamen judices Indos quos vagos et incertae sedis seu soli comperiebant, sub certis legibus et conditionibus in perpetuum concedere et assignare."

"Even when no possession by Spaniards is alleged, the judges are accustomed to grant and assign (in serfdom) those Indians whom they have found to be wandering, of uncertain abode and local habitation, under fixed terms and conditions."

But more especially we call attention to the passage, (Op. cit. I, p. 197):

"Indos omnino feros sylvestres et per campos palantes oberrantes—procedi posse arbiter ut per vim capi, domari et in servitutem redigi possent."

"The Indians who are altogether savage and denizens of the forest, who wander to and fro through the open country, may in my opinion be dealt with so that they may be forcibly taken, subjugated and reduced into slavery."

Nothing need be added to this statement. That the Walapai were a "savage" tribe, that they wandered about over the open country, throughout Spanish and Mexican times, is undeniable. That, according to Solorzano, they had no rights which could be urged against the Crown or its officers, and that they were not even included in the general

protection of Indians who lived peaceful lives in fixed places, is clearly established.

We may say, therefore, that both negatively and affirmatively Petitioner has failed in any way to impair the validity of Respondent's contention that neither the Walapai Indians nor any aggregation of Indians like them, had in any degree the remotest sort of a title to the lands on which they lived under the Spanish crown. They could be taken individually or collectively, sold as slaves or transferred as serfs, and removed from the place in which they were found.

Petitioner has failed to cite a single instance in which loose tribal aggregations like these were treated otherwise under Spanish law. They have contented themselves with reassertions of the undisputed proposition that Indians as such were not outlawed by Spain, that they might acquire property, and that Spanish officials were strictly ordered to protect them. But it is not Indians as such whose lands are in question, but a definite kind of Indians, savage Indians, "denizens of forests". It is these Indians, who, it is submitted, had no right and could have no right while in that status under Spanish and Mexican law to a general or a special property over the territories they inhabited no matter how long they had wandered over it.

Petitioner has dealt rather lightly with the condition of the Indians between the establishment of Mexican independence and the Treaty of Guadalupe Hidalgo, a period of about thirty years. The brief merely refers to the "Plan of Iguala", (p. 77, Note 73) under which "All the inhabitants of New Spain, without distinction, whether Europeans, Africans or Indians are citizens of this monarchy"—a plan was incorporated into the Mexican Declaration of Independence of Oct. 6, 1821.

This is undisputed and it will be readily conceded by Respondent that any whites or Africans who wandered

about as savages in Mexican territory would be dealt with just as Indians would be.

As an example of the Mexican attitude in this matter it may be well to cite a Circular of the Ministerio de Formento, of September 14, 1866. Although later in date than the treaty of Guadalupe Hidalgo it was prepared at a time when Indian claims were more tenderly treated than they had ever been before.

It states:

> "In all titles to property of public lands care is taken to say that they are granted without prejudice to the rights of third persons, and although *such a prejudice strictly does not exist in respect to lands of which native Indians are in possession, when they lack a title granted by competent authority,* the rule has arisen to avoid dispossessing them."

It is clear that this is both a statement of law and of practical policy. So far as the law is concerned, the italicized sentence indicates what the law was in 1866 and a fortiori in 1848. The fact of possession by an Indian tribe was no basis of a title.

Respectfully submitted,

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